

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

ANDRIAN SHERMAN,) CASE NO. C07-0778-MJP
)
Plaintiff,)
)
v.)
) REPORT AND RECOMMENDATION
PATRICK BARNES, et al.,)
)
Defendants.)
_____)

INTRODUCTION

Plaintiff, proceeding *pro se* and *in forma pauperis*, has filed an action pursuant to 42 U.S.C. § 1983. He alleges that while he was incarcerated at the Monroe Correctional Complex in Monroe, Washington, he received inadequate medical care, in violation of the Eighth Amendment to the Constitution. Plaintiff and defendants have filed motions for summary judgment. Having considered the briefs, declarations, and exhibits submitted by the parties, the Court concludes that plaintiff's motion for summary judgment should be denied and defendants' motion for summary judgment should be granted.

BACKGROUND

The declarations submitted by defendants in support of their motion for summary judgment establish the following facts, which, except as noted below, are uncontroverted by plaintiff:

01 Plaintiff was incarcerated at the Monroe Correctional Complex ("MCC") on June 8, 2005,
02 when he had surgery to remove four wisdom teeth. (Dkt. No. 35, Ex. 2, Attachment A). After
03 surgery, plaintiff was prescribed pain killer and was discharged. (*Id.*) On June 12, 2008, plaintiff
04 complained of swelling, infection, and not having been given antibiotics following his surgery.
05 (*Id.*, Ex. 3 at 1). Susan Williams, a registered nurse at MCC, examined plaintiff and observed that
06 the right side of his face and neck were swollen. (*Id.*) Before she could finish her exam, however,
07 plaintiff apparently got angry and left. (*Id.* at 2).

08 Four hours later, plaintiff returned and Nurse Williams finished her exam. She looked in
09 plaintiff's mouth and saw no signs of infection. (*Id.*) She also called in a physician's assistant,
10 Patrick Barnes, to confer about plaintiff's status. (*Id.*) She advised Barnes of plaintiff's vital
11 signs, which were within normal limits. Barnes advised plaintiff to continue using the pain
12 medications and to use ice packs if necessary to reduce swelling. (*Id.*, Ex. 4 at 2). Barnes further
13 advised plaintiff to return the next morning if pain persisted.

14 That same day, plaintiff submitted an emergency grievance to a corrections officer, Lt.
15 Richard Samp. (*Id.*, Ex. 8). Lt. Samp contacted Nurse Williams, who informed him that plaintiff
16 had been seen that day and was not in medical danger. Lt. Samp then referred the grievance to
17 the grievance coordinator to be processed as a routine matter. (*Id.*)

18 The next morning, plaintiff was admitted to the inpatient unit of MCC, with a diagnosis
19 of "dry socket," an apparently common condition following tooth extraction. (*Id.*, Ex. 4 at 2).
20 Plaintiff was administered antibiotics intravenously. (*Id.*, Ex. 4 at 2). After three days, plaintiff
21 was switched to oral antibiotics. (*Id.*) The pain returned, and plaintiff was again placed on I.V.
22 antibiotics. (*Id.*)

01 During this time, plaintiff filed another emergency grievance with Lt. James Asin, a
02 corrections officer at MCC. (*Id.*, Ex. 6). Lt. Asin contacted medical staff and ascertained that
03 plaintiff was receiving medical care. Lt. Asin then referred the matter to the grievance coordinator
04 to be processed as a routine matter. (*Id.*)

05 On June 18, 2005, plaintiff was sent to Harborview Medical Center to be examined for a
06 possible abscess. (*Id.*, Ex. 2, Attachment C). Plaintiff was diagnosed with a right submandibular
07 abscess which was drained. (*Id.*) Plaintiff returned to the inpatient clinic at MCC on June 22,
08 2005. (*Id.*, Ex. 2, Attachment A). He requested to be discharged and was returned to the general
09 population on June 28, 2005. (*Id.*)

10 In his own declaration, which is the only substantive statement by a witness that supports
11 plaintiff's motion for summary judgment,¹ plaintiff does not dispute the basic chronology of the
12 treatment described above. However, plaintiff's account differs in that he adds to these facts in
13 several ways: Overall, plaintiff describes the medical staff at MCC as being unsympathetic to his
14 condition and skeptical about the veracity of his complaints. In particular, plaintiff states that
15 despite having been told by the doctor who removed his wisdom teeth that antibiotics would be
16 waiting for him back at the prison, none were. (Dkt. No. 24 at 4). Plaintiff further states that
17 physician's assistant Barnes told him that the reason his face was swollen was that the faces of
18 African Americans tended to swell up more than the faces of other races, and African American

19
20 ¹ Plaintiff attaches to his declaration a brief statement by an inmate named John Coleman,
21 who states that he (Coleman) received antibiotics after surgery. (Dkt. No. 24, Ex. A). However,
22 the relevance of this statement is questionable, since it does not describe the circumstances under
which Coleman received antibiotics. The Court also notes that the statement was not made under
penalty of perjury.

01 bones healed more slowly. (*Id.*) Barnes denies having made any comments related to race. (Dkt.
02 No. 35, Ex. 4 at 2).

03 In addition, plaintiff states that once he was given antibiotics intravenously at MCC, the
04 dosage was insufficient. (Dkt. No. 24 at 7-8). He also states that before arriving at Harborview,
05 he was taken to a clinic named “Valleyview,” where he was told by a doctor that due to the “delay
06 in seeking treatment” and the “advanced form of infection,” plaintiff would die if he were not
07 transported to Harborview. (*Id.* at 9). Plaintiff states that once he arrived at Harborview and was
08 examined by doctors, he was told that if he had waited one more day, he would have died. (*Id.*)
09 Plaintiff further states that the doctors at Harborview also told him that “his chances to survive
10 the actual anesthesia and the surgery was very slim.” (*Id.* at 9-10). Plaintiff chose to undergo the
11 surgery, even though he did so “through anguish and tears.” (*Id.* at 10).

12 Finally, plaintiff states that he has needed two additional surgeries since the operation at
13 Harborview “to correct the effects of the Monroe medical staff’s refusal to provide some form of
14 post-surgical care for the plaintiff.” (*Id.* at 11). Plaintiff states that he “continues to suffer to this
15 day by way of peirceing [sic] pain in his throat and jaw if he opens his mouth too wide.” (*Id.* at
16 13).

17 On June 5, 2007, plaintiff filed the instant complaint pursuant to 42 U.S.C. §1983. (Dkt.
18 No. 6). The Court dismissed three defendants and directed the Clerk to serve the complaint on
19 the remaining defendants. (Dkt. No. 7). Defendants filed their answer on August 22, 2007. (Dkt.
20 No. 18).

21 The Court issued an Order on August 27, 2007, setting deadlines for discovery and
22 dispositive motions. (Dkt. No. 19). The cut-off date for discovery was November 1, 2007; the

01 cut-off for dispositive motions was December 1, 2007. (*Id.* at 1). On September 19, 2007, before
02 the close of discovery, plaintiff filed a motion for summary judgment. (Dkt. No. 22). Defendants
03 filed their own motion for summary judgment on November 30, 2007. (Dkt. No. 35). Both
04 motions were subsequently noted for consideration by the Court on December 28, 2007. (Dkt.
05 No. 36).

06 On December 26, 2007, plaintiff filed a motion for an extension of time to conduct further
07 discovery and to file a response to defendants' motion. (Dkt. No. 37). The Court denied this
08 eleventh-hour motion as being inconsistent with the deadlines previously established by the Court
09 and also not stating good cause for the extension. (Dkt. No. 39). The summary judgment motions
10 are now ready for review.

11 DISCUSSION

12 Summary judgment is proper only where "the pleadings, depositions, answers to
13 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
14 genuine issue as to any material fact and that the moving party is entitled to judgment as a matter
15 of law." Fed. R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). The
16 court must draw all reasonable inferences in favor of the non-moving party. *See F.D.I.C. v.*
17 *O'Melveny & Meyers*, 969 F.2d 744, 747 (9th Cir. 1992), *rev'd on other grounds*, 512 U.S. 79
18 (1994). The moving party has the burden of demonstrating the absence of a genuine issue of
19 material fact for trial. *See Anderson*, 477 U.S. at 257. Mere disagreement, or the bald assertion
20 that a genuine issue of material fact exists, no longer precludes the use of summary judgment. *See*
21 *California Architectural Bldg. Prods., Inc., v. Franciscan Ceramics, Inc.*, 818 F.2d 1466, 1468
22 (9th Cir. 1987). In addition, "[w]hen the nonmoving party relies only on its own affidavits to

01 oppose summary judgment, it cannot rely on conclusory allegations unsupported by factual data
02 to create an issue of material fact.” *Hansen v. United States*, 7 F.3d 137, 138 (9th Cir. 1993).

03 Plaintiff’s claim of inadequate medical care is governed by the Supreme Court’s decisions
04 interpreting the Eighth Amendment in the prison context. These cases establish that denial of
05 medical attention to prisoners constitutes an Eighth Amendment violation only if the denial
06 amounts to *deliberate indifference* to serious medical needs of the prisoners. *See Toussaint v.*
07 *McCarthy*, 801 F.2d 1080, 1111 (9th Cir. 1986) (emphasis added). In *Farmer v. Brennan*, 511
08 U.S. 825 (1994), the Supreme Court defined a strict standard which a prisoner must meet in order
09 to establish “deliberate indifference.” Mere differences of opinion, negligence or even recklessness
10 concerning the appropriate treatment is insufficient. 511 U.S. at 835-37. Rather, a prison official
11 is liable only if he knows that plaintiff faces “a substantial risk of serious harm and disregards that
12 risk by failing to take reasonable measures to abate it.” *Id.* at 847. In general, expert opinion is
13 necessary to establish a claim of deliberate indifference. *See Hutchinson v. United States*, 838
14 F.2d 390 (9th Cir. 1988)

15 Here, plaintiff simply has not shown that a triable issue of fact exists that would hold
16 defendants liable under this standard. Defendants have submitted uncontroverted evidence that
17 plaintiff received medical attention during and following the removal of his wisdom teeth. It is,
18 of course, regrettable that plaintiff’s mouth became infected after the surgery, and the Court does
19 not doubt that this infection caused plaintiff much discomfort. However, the record clearly shows
20 that plaintiff was treated for this infection by medical staff at MCC and Harborview. Even if the
21 Court were to accept plaintiff’s statements that he had to demand this treatment, or that it was
22 given grudgingly by prison staff, such conduct would not rise to the level of a constitutional

violation. *See Oltarzewski v. Ruggiero*, 830 F.2d 136, 139 (9th Cir. 1987) (verbal harassment alone does not rise to the level of a constitutional violation); *cf. Farmer*, 511 U.S. at 832 (“The Constitution does not mandate comfortable prisons.”)

Therefore, the Court concludes that plaintiff has not satisfied his burden of showing that a genuine issue of material fact exists regarding his claim that defendants provided inadequate medical care. Plaintiff’s additional claims that various defendants failed to properly respond to his grievances are premised upon an initial finding of inadequate medical care. Because plaintiff fails to meet his burden regarding this initial finding, his remaining claims also fail. Accordingly, the Court recommends that plaintiff’s motion for summary judgment be denied and that defendants’ motion for summary judgment be granted.

CONCLUSION

For the foregoing reasons, the Court recommends that plaintiff’s motion for summary judgment be denied, that defendants’s motion for summary judgment be granted and that this action be dismissed with prejudice. A proposed Order accompanies this Report and Recommendation.

DATED this 14th day of January, 2008.


Mary Alice Theiler
United States Magistrate Judge